Sathiaval a/l Maruthamuthu v Shell Malaysia Trading Sdn Bhd

HIGH COURT (IPOH) — CIVIL SUIT NO 22-58 OF 1990
KANG HWEE GEE J
2 DECEMBER 1997

Labour Law *— Employment — Termination of employment— Frustration — Whether employee's contract of service with the employer was frustrated by virtue of the former's detention — Whether employer discharged from further performance of the contract of employment — Whether termination of the employee's contract of employment was wrongful and unlawful*

The plaintiff was employed as a handyman with Shell Malaysia Trading Sdn Bhd ('the defendant'). On 12 December 1983, he was detained by police under the Emergency (Public Order and Prevention of Crimes) Ordinance 1969. Thereafter from 8 February 1984, he was detained at the Pusat Pemulihan Akhlak, Pulau Jerejak, Pulau Pinang for a period of two years. After his release with effect from 9 February 1986, he was subjected to a restriction order for another two years. While under detention, the plaintiff informed the defendant of his whereabouts and status vide a letter dated 17 March 1984. By a letter dated 3 April 1984, the defendant terminated the plaintiff's employment on the ground of frustration of the employment contract. The plaintiff then brought this claim seeking, inter alia, a declaratory order that the termination and/or dismissal of the plaintiff's employment was erroneous in law and amounted to breach of contract, was null and void and of no effect; and a declaratory order that the plaintiff was still in the defendant's employment without any breach of service and was entitled to all salaries, allowances and promotion.

The defendant contended that the declaratory remedies sought by the plaintiff were misconceived in law and were not available in the High Court; and even assuming that they were available, the contract of employment had been frustrated by the plaintiff's detention. The issues to be determined by the court were: (i) whether the plaintiff's contract of service with the defendant was frustrated by virtue of his detention, thereby discharging the defendant from further performance of the contract of employment; and (ii) in the light of this, whether the termination of the plaintiff's contract of employment on 3 April 1984 was wrongful and unlawful.

Held, dismissing the plaintiff's claim with costs:

(1) It was clear that the inability of the plaintiff to continue his employment with the defendant was not due to the default or fault of the defendant. It was also clear that the defendant would not be available for work for at least two years in which event it would have been necessary for the defendant to employ another handyman in his place. The circumstances were such that one could reasonably find that there had been a radical change in

what had been undertaken by the parties in the employment contract to conclude that it had been frustrated by the plaintiff's detention. Accordingly, the first issue would have to be answered in the positive and the second, in the negative (see p 747C–D); *Hare v Murphy Brothers Ltd* [1974] 3 All ER 940, *FC Shepherd & Co Ltd v Jerrom* [1987] 1 QB 301 and *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 followed.

(2) Where there has been a purported termination of a contract of service, a declaration that the contract still subsisted would rarely be made and would not be made in the absence of special circumstances because of the principle that the courts would not grant specific performance of contracts of service. In the instant case, it was clear that the reliefs the plaintiff was seeking in prayers in his statement of claim were declaratory of the legality of his termination by his employer which ought not to be granted (see p 748D–E, G); *Francis v Municipal Councillors of Kuala Lumpur* [1962] MLJ 407 and *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361 followed.

[Bahasa Malaysia summary

Plaintif digaji sebagai seorang yang membuat kerja-kerja rencam dengan Shell Malaysia Trading Sdn Bhd ('defendan'). Pada 12 Disember 1983, beliau telah ditahan oleh polis di bawah Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969. Selepas itu dari 8 Februari 1984, beliau telah ditahan di Pusat Pemulihan Akhlak, Pulau Jerejak, Pulau Pinang untuk tempoh dua tahun. Selepas pembebasannya mulai 9 Februari 1986, beliau telah tertakluk pada satu perintah tahanan untuk dua tahun lagi. Sewaktu di bawah tahanan, plaintif memberitahu defendan di mana dia berada dan tarafnya menerusi sepucuk surat bertarikh 17 Mac 1984. Melalui sepucuk surat bertarikh 3 April 1984, defendan menamatkan penggajian plaintif atas alasan kekecewaan kontrak penggajian. Plaintif kemudiannya membawa tuntutan ini memohon, antara lain, satu perintah perisytiharan bahawa penamatan dan/atau pembuangan kerja plaintif adalah salah di sisi undang-undang dan sama seperti kemungkiran kontrak, adalah tak sah dan terbatal dan tidak berkesan; dan satu perintah perisytiharan bahawa plaintif masih berada dalam penggajian defendan tanpa apa-apa kemungkiran perkhidmatan dan berhak kepada segala gaji, elaun dan kenaikan pangkat.

Defendan berhujah bahawa remedi perisytiharan yang dipohon oleh plaintif adalah salah tanggap di sisi undang-undang dan tidak boleh didapati di Mahkamah Tinggi; dan sekalipun menganggap bahawa boleh didapati, kontrak penggajian telah dikecewakan oleh tahanan plaintif. Isu-isu untuk diputuskan oleh mahkamah adalah: (i) sama ada kontrak perkhidmatan plaintif dengan defendan kecewa disebabkan tahanan beliau, dengan itu melepaskan defendan daripada pelaksanaan lanjut kontrak penggajian; dan (ii) memandangkan ini,

sama ada penamatan kontrak penggajian plaintif pada 3 April 1984 adalah salah dan menyalahi undang-undang.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Adalah jelas bahawa ketidakupayaan plaintif untuk meneruskan penggajiannya dengan defendan tidak disebabkan oleh kemungkiran atau kesalahan defendan. Adalah juga jelas bahawa defendan tidak akan dapat bekerja untuk sekurang-kurangnya dua tahun yang mana adalah perlu untuk defendan menggaji seorang yang boleh membuat kerja-kerja rencam yang lain sebagai gantinya. Keadaan adalah demikian hinggakan seorang boleh dengan munasabahnya mendapati bahawa perubahan radikal telah berlaku dalam apa yang diakujanji oleh pihak-pihak dalam kontrak penggajian bagi menyimpulkan bahawa ia telah dikecewakan oleh tahanan plaintif. Dengan itu, isu pertama haruslah dijawab secara positif dan yang kedua secara negatif (lihat ms 747C–D); *Hare v Murphy Brothers Ltd* [1974] 3 All ER 940, *FC Shepherd & Co Ltd v Jerrom* [1987] 1 QB 301 dan *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 diikut.

(2) Di mana andainya terdapat penamatan kontrak perkhidmatan, suatu perisytiharan bahawa kontrak masih kekal jarang dibuat dan tidak akan dibuat dalam ketiadaan keadaan istimewa disebabkan prinsip bahawa mahkamah tidak akan memberikan pelaksanaan spesifik kontrak perkhidmatan. Dalam kes ini, adalah jelas bahawa relief yang dipohon oleh plaintif dalam pernyataan tuntutannya adalah perisytiharan kesahan penamatan oleh majikan yang tidak patut dibenarkan (lihat ms 748D–E, G); *Francis v Municipal Councillors of Kuala Lumpur* [1962] MLJ 407 dan *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361 diikut.]

Notes

For cases on termination of employment, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 790–835.

Cases referred to

Dato Yap Peng & Ors v Public Bank & Ors [1997] 3 MLJ 484 (refd)
Davis Contractors Ltd v Fareham UDC [1956] AC 696 (folld)
Hare v Murphy Brothers Ltd [1974] 3 All ER 940 (folld)
FC Shepherd & Co Ltd v Jerrom [1987] 1 QB 301 (folld)
Francis v Municipal Councillors of Kuala Lumpur [1962] MLJ 407 (folld)
Khau Daw Yau v Kim Nam Realty Development Sdn Bhd [1983] 1 MLJ 335; [1984] 1 MLJ 256 (refd)
Khoo Than Sui v Chan Chiau Hee [1976] 1 MLJ 25 (refd)
Lavarack v Woods of Colchester Ltd [1963] 3 All ER 683 (refd)
Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor [1997] 2 MLJ 361 (folld)

Ramli bin Zakaria & Ors v Government of Malaysia [1982] 2 MLJ 257 (refd)
Subramaniam s/o Margiser v Esso (M) Bhd [1990] 1 ILR 479 (refd)
Taylor v Caldwell (1863) 3 B & S 826 (refd)
Vine v National Dock Labour Board [1956] 3 All ER 939 (refd)

Legislation referred to

Contracts Act 1950 s 57(2)
Emergency (Public Order and Prevention of Crimes) Ordinance 1969

Gurbachan Singh (*Bachan & Kartar*) for the plaintiff.
Thavalingam (*Shearn Delamore & Co*) for the defendant.

Kang Hwee Gee J: The plaintiff was employed as a Handyman Group A in Shell Malaysia Trading Sdn Bhd, the defendant, with a basic salary of RM432.

On 12 December 1983, he was detained by the police at the Ayer Tawar Police Station under the Emergency (Public Order and Prevention of Crimes) Ordinance 1969.

Thereafter from 8 February 1984, he was detained at the Pusat Pemulihan Akhlak, Pulau Jerejak, Pulau Pinang for a period of two years. After his release with effect from 9 February 1986, he was subjected to a restriction order for another two years.

While under detention, the plaintiff informed the defendant of his whereabouts and status, vide a letter dated 17 March 1984.

By a letter dated 3 April 1984, the defendant terminated the plaintiff's employment on ground of frustration of the employment contract. The letter reads as follows:

Encik Sathiaval a/l Maruthamuthu
O/T PJ 39/84 Sa/1M
No KP 5934009 (Biru)

d/a En Abdul Ghani bin Salleh 3 April 1984
b/p Penguasa Kanan
Pusat Pemulihan Akhlak
Pulau Jerejak
Pulau Pinang

Dear Mr Sathiaval,

FRUSTRATION OF CONTRACT

We have received your letter of 17 March 1984, informing us of your present whereabouts and your position. We have also received a similar letter from the Pusat Pemulihan Akhlak in Pulau Jerejak confirming your detention for a two-year period.

While we appreciate your problem and sympathize with you, we are unable to continue your employment with us as your services will not be available to us until February 1986. As such, your services are hereby terminated with immediate effect.

We shall write to you in due course informing you of all the monies due to you. In the meantime, we take this opportunity to thank you for your service with us.

Yours faithfully,
for SHELL MALAYSIA TRADING SDN BHD
'Original Signed by
Victor Foo'

cc MFT/32 — Further to our memo dated 29 February 1984, we enclose herewith record cards for the abovenamed for calculation of his benefits. Kindly include proportionate bonus calculated up to 31 December 1983. His leave balance is nil. Please pay him termination benefits.

In this suit, the plaintiff is seeking:

(a) suatu perintah deklarasi bahawa penamatan dan/atau pembuangan kerja plaintif adalah salah di sisi undang-undang dan adalah pemecahan, kontrak batal dan tidak sah dan tidak berefek;

(b) suatu perintah deklarasi bahawa plaintif masih lagi dalam tempoh pekerjaan dengan defendan tanpa apa-apa kemungkiran perkhidmatan dan adalah berhak kepada segala-gala gaji, elaun dan kenaikan;

(c) satu perintah bahawa defendan membayar kepada plaintif segala-segala gaji, elaun dan kenaikan yang tertunggak semenjak Disember 1983 sehingga dikembalikan semula; dan

(d) dalam alternatif, pihak defendan membayar segala-gala faedah penamatan dan segala-gala faedah yang lain kepada plaintif.

The defence is two-pronged. First, the defendant contends that the declaratory remedies sought by the plaintiff are misconceived in law and are not available in the High Court. Secondly, it contends that even assuming that they are available, the contract of employment has been frustrated by the plaintiff's detention.

The facts as stated are not in dispute. The parties have decided not to call any witness to give evidence. They have also identified and framed for the determination of the court the following agreed statement of issues:

(1) Was the plaintiff's contract of service with the defendant frustrated by virtue of his detention at Pusat Pemulihan Akhlak, Pulau Jerejak with effect from 8 February 1984, thereby discharging the defendants from further performance of the said contract of employment?

(2) In the light of the above, was the termination of the plaintiff's contract of employment on 3 April 1984 wrongful and unlawful?

In the event that the answers are favourable to the plaintiff, he would be entitled to the declarations and order as prayed. Further, the parties have also decided not to submit orally before the court but to submit written outlines instead.

Was the contract of employment frustrated by the plaintiff's detention?

Before the landmark case of *Taylor v Caldwell* (1863) 3 B & S 826, by the doctrine of the sanctity of contract, in the absence of an express limitation,

a person was strictly bound by his contract and must take whatever the consequences of his inability to perform his obligation notwithstanding that it was due to a change of circumstances beyond the parties' foreseeability and control.

Taylor v Caldwell laid the foundation for the doctrine of frustration in English law. In that case, the defendants had agreed to permit the plaintiffs to use a music hall for concerts for four specified nights. After the contract was entered into — but before the first night — the hall was destroyed by fire. Departing from the doctrine of sanctity, Blackburn J speaking for the Court of Queen's Bench found that from the nature of the contract, the parties must have known from the beginning that the fulfilment of the contract depended on the continued existence of the concert hall. He held that the contract was to be construed 'as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing, without default of the contractor ...'.

Today, a contract which has been rendered physically impossible to fulfil by a change of circumstances after the formation of the contract may be discharged by applying the doctrine of frustration in English law.

The doctrine has been legislated into the Contracts Act 1950 in s 57(2), which reads as follows:

> A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

The section itself, unfortunately, has not been dissected and interpreted in depth as our courts in their deliberation on the subject prefer instead to apply the principle as stated in the speech of Lord Radcliffe in the House of Lords' case of *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 (at p 729):

> ... frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

(See *Khoo Than Sui v Chan Chiau Hee* [1976] 1 MLJ 25, *Ramli bin Zakaria & Ors v Government of Malaysia* [1982] 2 MLJ 257 and *Khau Daw Yau v Kim Nam Realty Development Sdn Bhd* [1983] 1 MLJ 335 in the High Court; [1984] 1 MLJ 256 upon appeal to the Federal Court and *Dato Yap Peng & Ors v Public Bank & Ors* [1997] 3 MLJ 484).

There is no direct authority in our jurisdiction whether an employer can frustrate a contract of employment of an employee who is prevented from continuing his contract of service by reason that he has been arrested or detained by the authorities as in the present case. To settle this issue, one must draw on the persuasive judgment of the English Court of Appeal in *Hare v Murphy Brothers Ltd* [1974] 3 All ER 940, the ratio of which in my view could be applied to the instant case.

In that case, Mr Hare had been convicted of the offence of unlawful wounding and was sentenced to 12 months' imprisonment which rendered

it impossible for him to continue his employment with Murphy Brothers with whom he had been working for 25 years as a foreman. It was held that the imprisonment had rendered it impossible for him to continue his employment with his employer. He was therefore not entitled to redundancy payments or a claim for unlawful dismissal. Per Lord Denning MR (at pp 942–943):

> So also here, where the man committed an unlawful act and was sentenced to 12 months' imprisonment, the event was so unforeseen and the delay so long that the contract of employment was brought automatically to an end when the sentence was imposed. (See the principle stated in *Davis Contractors Ltd v Fareham UDC* [1956] 2 All ER 145). In the case of a contract of employment, you must look at the length of time he has been employed, the position which he held, and, of course, most important of all, the length of time which he is likely to be away from his work and unable to perform it — and the importance of getting someone else to do his job meanwhile. (See *Marshall v Harland & Wolff Ltd* [1972] 2 All ER 715). If it then appears that his job has been effectively brought to an end, the contract is frustrated.

In the more recent case of *FC Shepherd & Co Ltd v Jerrom* [1987] 1 QB 301, the English Court of Appeal re-examined the decision in *Hare v Murphy Brothers* which it was contended was not sufficiently precise.

In that case, the employee had entered into a four-year contract of apprenticeship with the employer as an apprentice plumber. He was convicted of conspiracy to commit assault and affray and was sentenced to a period of Borstal training of 39 weeks. The employer terminated his apprenticeship. It was submitted before the court that frustration of the employment contract had not occurred as the sentence of Borstal training was self-induced by the respondent himself and therefore did not meet the strict criteria of frustration which requires that the inability to perform a contract must be without default of the parties as set out in *Davis Contractors*.

It was held (per Lawton and Balcombe LJJ) that the sentence of Borstal training was an event which was neither foreseen nor provided for by the parties at the time of contracting and it had rendered the performance of the contract radically different from that which the parties had contemplated when they entered into it. There had been no fault or default on the part of the employers. The employee was not entitled to rely on his own default that his criminal conduct — although deliberate — had no effect on the performance of his contract as the imposition of the sentence of Borstal training had been the act of the judge and therefore the custodial sentence was capable in law of frustrating the contract.

The principle in *Hare v Murphy Brothers Ltd* appears to have been raised before in the Seremban High Court case of *Subramaniam s/o Margiser v Esso (M) Bhd* [1990] 1 ILR 479, the facts of which appear to be on all fours with the instant case. In that case the plaintiff, a process technician of Esso (M) Bhd, was detained by the police under the Emergency (Public Order and Prevention of Crime) Ordinance 1969. Due to his unavailability for work, Esso terminated his service although it had been informed of his predicament by letter. Mustapha J discussed, but declined to consider, the

A issue of frustration which was submitted to him by counsel on the ground that the same was not pleaded in the defendant's defence. He found on other grounds that the plaintiff had been wrongfully dismissed and accordingly awarded the plaintiff damages. Contrary to the submission of counsel for the plaintiff therefore, it is clear to me *Subramaniam* did not provide the authority that the defence of frustration is unavailable in a like situation.

To return now to the issue in the instant case, applying the rationale in *Hare v Murphy* and *FC Shepherd & Co Ltd v Jerrom* and the test in *Davis Contractors*, it is clear to me that the inability of the plaintiff to continue his employment with the defendant was not due to the default or fault of the defendant. It is also clear that the defendant would not be available for work for at least two years in which event it would have been necessary for the defendant to employ another handyman in his place. The circumstances were such that one can reasonably find that there had been a radical change in what had been undertaken by the parties in the employment contract to conclude that it had been frustrated by the plaintiff's detention.

Accordingly, the first issue as framed would have to be answered in the positive and the second, in the negative.

Whether court should exercise discretion to grant declaration

Apart from the issues which have been answered, the other issue which constitutes the defence of the defendant requires determination — whether the declaratory remedies sought by the plaintiff are misconceived in law and available to him. A decision one way or other, however, would now be purely academic in view of my earlier finding.

The power to make a declaratory judgment, having its origins in equity, is strictly discretionary in nature as opposed to the pronouncement of a judgment based on a specific cause of action which a litigant who has proved his case is entitled to as of right. Instances where courts would or would not exercise their discretion to make declaratory judgments are too numerous to describe in this judgment. They could be gleaned from reputable textbooks on the subject. For the present therefore, I propose to deal only with two instances which I consider relevant to the plaintiff's claim.

In his written outline, counsel for the defendant relied on the recent Federal Court case of *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361 to support his contention that the plaintiff in this case is not entitled to the declaration.

In that case the appellant, a market supervisor in the employ of the respondent local council, was dismissed from his employment. He sought a declaration that his dismissal was void and of no effect apart from also claiming damages. At an O 18 r 19 hearing before the High Court, counsel for the local council raised a preliminary objection (on grounds which are not entirely clear in the judgment) that the appellant was not entitled to a declaration that his dismissal was void and for an order that he be reinstated to his post. The High Court allowed the preliminary objection and dismissed the appellant's claim. On appeal, the Federal Court (per Peh Swee Chin

FCJ) held that the High Court was right to have ruled in favour of the preliminary objection, although it allowed the appeal on the ground that (at p 372):

> ... there was no prior express agreement by the parties herein at the time it was raised that it would conclusively decide the whole case one way or another.

It held that a dismissed employee cannot claim any declaration that his dismissal was void save if he is a public employee or if he institutes his claim in the Industrial Court. It based its ruling on the accepted principle that the law will not grant specific performance of a contract of service between a master and servant and (at p 366):

> ... that the master has always the power to dismiss him in breach of such contract without any danger of being asked or compelled to re-employ him, thus the only remedy left to the servant is to sue for damages.

A clearer exposition of the law appears in *Francis v Municipal Councillors of Kuala Lumpur* [1962] MLJ 407, which involved the termination of a council worker. It was held, on appeal to the Privy Council, that where there has been a purported termination of a contract of service, a declaration that the contract still subsisted would rarely be made and would not be made in the absence of special circumstances because of the principle that the courts would not grant specific performance of contracts of service (per Lord Morris of Borth-y-Gest).

Special circumstances have been held to exist to merit the grant of a declaration where without such a declaration the plaintiff would be forever disabled from following his chosen trade (*Vine v National Dock Labour Board* [1956] 3 All ER 939) and where side benefits would accrue to the employee if his employment continued and damages for wrongful dismissal might not cover the loss of those side benefits (*Lavarack v Woods of Colchester Ltd* [1963] 3 All ER 683; see PW Young, *Declaratory Orders* (2nd Ed) para 2203 p 194).

In the instant case, it is clear that the reliefs the plaintiff is seeking in prayers in his statement of claim are declaratory of the legality of his termination by his employer which, by the rationale in *Francis v Municipal Councillors of Kuala Lumpur* and *Mohd bin Ahmad*, ought not to be granted.

The plaintiff's claim is dismissed with costs.

Claim dismissed.

Reported by Koay Sook Kuan